Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al., Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, and CROPLIFE AMERICA, et al., Intervenor-Defendants.	No. C01-0132 C OPPOSITION OF INTERVENOR-DEFENDANTS CROPLIFE AMERICA, ET AL., TO PLAINTIFFS' "MOTION TO MODIFY JULY 2, 2002 ORDER . . . ." Noted on Motion Calendar: Friday, March 25, 2005

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Intervenor-Defendants CropLife America, *et al.* ("CLA")[1] hereby oppose plaintiffs' "Motion to Modify July 2, 2002 Order to Establish Schedule for Defendant to Revise the Required Effects Determinations and Provide Adequate Foundation for Consultations" (Dkt. No. 316). Although the plaintiffs here have already obtained the *procedural* relief sought in their Complaint, they now ask for new and different substantive relief that is beyond the scope of this lawsuit. While cast as a motion to "modify" this Court's earlier order, plaintiffs are in reality challenging the merits of EPA's "no effect" and "not likely to adversely affect" determinations, an entirely new substantive cause of action that seeks relief not sought in their Complaint. In doing so, plaintiffs essentially ask this Court to circumvent the normal legal process and sidestep the requirements for judicial review of substantive agency action, including the filing of an administrative record, and dramatically alter the status quo and the parties' settled expectations.

Plaintiffs also ask this Court to insert itself in a new and *separate* ongoing agency activity – EPA's revisiting of certain effects determinations – that is wholly committed to EPA's discretion, and that has not resulted in final agency action. EPA is under no legal duty to review further its "no effect" or "not likely to adversely affect" decisions. That it has voluntarily chosen to do so does not negate the agency's compliance with the Court's order. It simply reflects a conscientious desire to update the effects determinations, where appropriate, to comport with subsequently adopted policies for conducting effects determinations. This Court should not allow plaintiffs to pin a new cause of action onto the tail end of this suit, especially while appeals are pending and the Court's jurisdiction is questionable. Plaintiffs' latest motion, filed some 31 months after the Court issued the Order in question, should be denied or stricken.

[1] This opposition is filed on behalf of all intervenors except the Washington State Farm Bureau and the Washington State Potato Commission, which are separately represented.

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INTRODUCTION

Plaintiffs' Complaint (Dkt. No. 1) alleged, in relevant part, that EPA was procedurally violating § 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), by failing to consult with the National Marine Fisheries Service ("NMFS") regarding the possible effects of pesticides on populations of salmon and steelhead that are listed as threatened or endangered species. Compl. ¶¶ 39-43. The Court granted plaintiffs partial summary judgment and found that EPA was in "substantial procedural violation of section 7(a)(2)." *See* July 16, 2003 Order (Dkt. No. 151) at 2; Aug. 8, 2003 Order (Dkt. No. 159) at 5. In its July 2, 2002 Order (Dkt. No. 73), the Court directed EPA to "make effects determinations and consult, as appropriate," with respect to 55 pesticides in accordance with a specific schedule. July 2002 Order at 17-18.

The plaintiffs did not appeal that order or question whether it adequately remedied the ESA § 7(a)(2) violation the Court had found. Instead, they parlayed the procedural order into substantive injunctive relief whose pesticide-by-pesticide termination was cast in terms of remedying the procedural ESA violation found by the Court. *See* January 22, 2004 Order (Dkt. No. 224) at 12 ("2004 Injunction").

EPA has met the schedule prescribed in the July 2002 Order, as EPA explains in its opposition and as plaintiffs begrudgingly admit. *See* Fed. Defs. Opp'n pt. I; Pls. Mot. at 2 ("EPA has made initial effects determinations for batches of pesticides roughly in accordance with the Court-ordered schedule"). Nonetheless, plaintiffs argue that the effects determinations EPA indisputably made in accordance with the 2002 procedural order are substantively "inadequate" and, therefore, somehow "fail[ ] to comply with the schedule" the Court had set. *Id.* at 4. This non-sequitur arises from plaintiffs' peculiar spin on EPA's voluntary decision in late 2004 to review its previous "may affect" determinations using the recently adopted approach outlined in the *Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs, U.S. Environmental Protection Agency: Endangered and Threatened Species*

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Effects Determinations (Jan. 23, 2004).[2] *See* Letter from James J. Jones (EPA) to Patti Goldman (Sept. 24, 2004) (copy at Ex. 3 to Fifth Declaration of Patti Goldman (Dkt. No. 317; hereinafter, "5 Goldman"). The *Overview* forms part of the basis for the "Joint Counterpart Endangered Species Act Section 7 Consultation Regulations" issued by the U.S. Fish and Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration ("NOAA") on August 5, 2004. See 69 Fed. Reg. 47732, 47734.

Plaintiffs distort EPA's decision, turning a voluntary revisiting of effects determinations under later-adopted procedures into an agency "admi[ssion] that it fell short of preparing adequate effects determinations in accordance with the timeline proposed by the Court." *See* Pls. Mot. at 5. According to plaintiffs, EPA's supposed "admission" covers not only the "may affect" determinations EPA said it would review, but also the "no effect" determinations that EPA is not planning to revisit. *Id.*

Plaintiffs' exhibits belie their own fanciful account of what EPA is doing. As the government explained in one of those exhibits, "neither EPA nor NOAA Fisheries has made a determination that any of EPA's 'may affect' determinations is 'inadequate.'" Letter from Wayne D. Hettenbach to Patti Goldman (Dec. 13, 2004) (copy at 5 Goldman Ex. 5). Moreover, the government said EPA knew of no information suggesting a need to disturb the "no effect" determinations it had made in accordance with the Court's schedule. *Id.*

Indeed, when plaintiffs' exhibits are taken at face value, the only "evidence" they contain to discredit EPA's effects determinations is an alleged *draft* NOAA letter (copy at 5 Goldman Ex. 2) that EPA disavowed seeing. *See* 5 Goldman Ex. 3 at 2. That unauthenticated draft should be stricken.[3]

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[2] Available at http://endangered.fws.gov/consultation/pesticides/overview.pdf.

[3] The document bears no agency letterhead, identifying stamps (other than a prominent "DRAFT" stamp on page 1), initials, or other potential indicia of authenticity. Further, there is no evidence to show that the official for whom the draft purports to have been prepared, Washington State Director Steve W. Landino, had ever laid eyes on it.

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ARGUMENT

I. PLAINTIFFS' REQUEST FOR JUDICIAL OVERSIGHT OF EPA'S ONGOING PESTICIDE REVIEW SHOULD BE DENIED

The Court should deny plaintiffs' motion for judicial superintendence of the pesticide reviews EPA is undertaking, under settled principles of judicial review.

1. As EPA's opposition to plaintiffs' motion explains, EPA has made the effects determinations required by the 2002 Order and is in full compliance with that order. Those determinations are presumed lawful, and plaintiffs bear the burden of proving otherwise. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507-12 (9th Cir. 1997). In this instance, EPA's effects determinations presumptively were based on the best science available and the procedures in effect at that time. Plaintiffs' only "evidence" to the contrary is EPA's voluntary decision to review some of those determinations using processes embodied in the newly-developed joint counterpart regulations issued by FWS and NMFS in cooperation with EPA. But, as plaintiffs' own exhibits demonstrate, EPA stands by those determinations and repudiates none of them. See 5 Goldman Exs. 3, 5.

2. EPA's voluntary decision to review some of the effects determinations does not invalidate any, let alone all, of the prior determinations. The law recognizes that neither science nor agency procedures stand still. An agency is under no legal compulsion to re-think each decision, such as the effects determinations EPA made in response to the Court's order, every time procedures change or new information becomes available. That "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 & n.19 (1989). Significant improvements have been made in EPA's risk assessment process, as part of the scrutiny accompanying the development of the joint

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counterpart regulations in 2004. Though not required to by any regulation or any Court order, EPA in its discretion has chosen to revisit the effects determinations using those new procedures.

3. Since this revisiting is not required by law or by the Court's prior orders, the Court cannot micromanage this exercise of EPA discretion. Under the Administrative Procedure Act ("APA"),[4] the Court has jurisdiction over EPA's activity only if there is "final agency action" or if EPA has "unlawfully withheld" taking some action that it is required to take. 5 U.S.C. § 706(1) and (2). Since EPA is in the middle of a voluntary reassessment of some of the effects determinations, there is no jurisdiction on a "final agency action" theory. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency action not "final" unless it marks the "consummation of the agency's decisionmaking process").

4. Thus, plaintiffs' request for judicial intervention must rest on a theory of imposing a schedule for "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). But as a unanimous Supreme Court stressed in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. __, 124 S. Ct. 2373 (2004) ("*SUWA*"), courts have jurisdiction over claims of unlawfully delayed action only when the plaintiff challenges a "*discrete action*" the agency was "*required to take.*" *Id.* at 2379 (emphases in original). Since EPA's review of its "may effect" determinations is not required by any statute or regulation, plaintiffs' motion fails. As the Supreme Court stated in *SUWA*,

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[4] "[B]ecause the ESA makes no special provision for judicial review of final agency actions, the scope of review [of ESA claims is] governed by the APA." *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclam.*, 143 F.3d 515, 522 (9th Cir. 1998); *see* 5 U.S.C. § 559 (APA applies to the extent it is not expressly superseded by another statute); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193-94 (9th Cir. 2000) (stressing the "importance of maintaining a uniform approach to judicial review of administrative action").

Further, the "task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Here, there is no administrative record before the Court on the effects determinations EPA made in response to the 2002 Order, or on the voluntary reviews EPA is undertaking.

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> The principal purpose of the APA limitations we have discussed – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disputes which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

124 S. Ct. at 2381.

5. Moreover, because there is no fixed deadline for revisiting the effects determinations, the so-called *TRAC* factors apply in ascertaining whether the timing for EPA's revisiting violates the APA as it is "unlawfully delayed." *See Independence Mining*, 105 F.3d at 507 (adopting in the Ninth Circuit the standards in *Telecomm. Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") for determining compliance with 5 U.S.C. §706(1)). That is, if EPA's timeframe for revisiting some effects determinations does not violate the ESA or APA, there is no legal violation allowing the Court to impose a given time schedule. But plaintiffs provide no analysis that their desired time schedule is compelled under the *TRAC* factors. For example, they fail to explain how the absence of a legislatively mandated timetable in the ESA favors the judicially mandated schedule they seek, and fail to analyze how requiring EPA to expedite a given action would divert resources from agency activities of a higher or competing priority. *See TRAC*, 750 F.2d at 80 (*TRAC* factors 2 and 4). *See also In Re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) ("respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities"). Accordingly, EPA should be allowed to proceed with its voluntary revisiting on its own schedule without judicial supervision.

II. THE COURT SHOULD STRIKE THE MOTION IN LIGHT OF THE PENDING APPEALS

Plaintiffs' motion is without merit for the reasons given above and in the Federal Defendants' opposition. However, the pendency of the appeals in the Ninth Circuit raises

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jurisdictional concerns, much as it did for plaintiffs' previous two motions.[5] The Court struck those motions in light of the pending appeals, with an option to refile once the Ninth Circuit issues its decision. *See* Minute Order (Dec. 24, 2004) (citing *Natural Resources Defense Council v. Southwest Marine Inc.*, 242 F.3d 1163 (9th Cir. 2001) and Fed. R. Civ. P. 62(c)) (Dkt. No. 315).

Plaintiffs' latest motion should also be stricken. Although the Court retains the jurisdiction during an appeal to act to preserve the status quo, *id.*, this principle, as codified in Rule 62(c), "does not restore jurisdiction to the district court to adjudicate anew the merits of the case." *Southwest Marine,* 242 F.3d at 1166 (quoting *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982)).

Plaintiffs' instant motion is an improper attempt to "adjudicate anew the merits of the case." Plaintiffs' previous two motions purported to seek modification or clarification of two aspects of the January 22, 2004 injunction. The instant motion goes much further and asks the Court to impose an entirely new remedy – a "Schedule for the Defendant to Revise the Required Effects Determinations and Provide Adequate Foundation for Consultation" (Pls. Prop. Order at 2) – on top of the schedule with which EPA has already complied.

Plaintiffs' new remedy would disrupt the status quo in at least three ways. First, the motion does not seek some minor "modif[ication]" of the July 2002 Order, but a wholesale revision that rests on an entirely different ground of liability from what the Court found. The Court found EPA in "substantial procedural violation of section 7(a)(2)" of the ESA. *See* July 16, 2003 Order at 2; Aug. 8, 2003 Order at 5. Consistent with that finding, the Court ordered *procedural* relief – that EPA "make effects determinations and consult, as appropriate" according to a

[5] The first of those motions (Dkt. No. 300) asked the Court to order EPA to take further steps to implement the injunction's provisions concerning point of sale notifications for pesticides used in urban areas. Plaintiffs' second motion (Dkt. No. 304) sought "clarification" that the injunction's noxious weed exclusion did not authorize the application of pesticides directly into salmon-supporting waters. CLA opposed both motions. *See* Dkt. Nos. 307, 310.

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schedule that EPA proposed and the plaintiffs endorsed. *See* July 2002 Order at 17. Part of plaintiffs' new theory, in contrast, is not that EPA failed to make effects determinations, but that the determinations EPA *did* make are substantively invalid when viewed in light of later information and procedures – hindsight whose use is impermissible. Such post-decision information "may not be advanced as a new rationalization either for sustaining or attacking an agency's decision." *Southwest Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Moreover, plaintiffs have not pleaded that claim in this action and it would require separate litigation to resolve.[6]

Second, plaintiffs' motion would alter the status quo by forcing EPA to expend resources to redo not only the "may affect" determinations it is voluntarily reviewing, but also all the "no effect" determinations it made. Under the ESA, "no effect" determinations are exclusively the province of the action agency, in this case EPA, so deference to the agency should be high. *See* 50 C.F.R. § 402.14(a); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983) (court should be "most deferential" when reviewing scientific determinations within agency's area of expertise). *See also Defenders of Wildlife v. Flowers*, No. Civ. 02-195-TUC-CKT, 2003 WL 22145716, at *7 (D. Ariz. Aug. 18, 2003) (effects determination and decision whether to consult are decisions for the action agency to make); *Southwest Center*, 100 F.3d at 1447-48

[6] Plaintiffs seem to realize the need for separate litigation, as they have filed a 60-day notice of intent to sue challenging EPA's effects determinations. *See* 5 Goldman Ex. 1. Yet their motion tries to shoehorn those extraneous issues into this lawsuit. Their view seems to be that, in light of subsequent developments, the Court's order on summary judgment did not go far enough, in the sense that it did not dictate precisely how EPA should go about making its effects determinations. But plaintiffs have already litigated and lost a remedy with a qualitative component. Their summary judgment motion sought a declaration that EPA had violated ESA § 7(a)(2) by failing to consult, and an order directing EPA to "commence consultations." *See* Pls. Mot. for S.J. (Dkt. No. 14) at 2; Mem. in Supp. of Pls. Mot. for S.J. (Dkt. No. 15) at 24. In the face of opposing arguments from EPA and intervenors stressing judicial deference to administrative agency expertise, the Court chose not to order mandatory consultations as plaintiffs had requested, but to leave EPA with the discretion to "make effects determinations and consult, as appropriate." 2002 Order at 17-18. Although plaintiffs' dissatisfaction with EPA's effects determinations may give rise to another lawsuit, it should not be the basis for allowing their continued "agitation of settled issues" in this one. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (citations omitted).

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(Forest Service's initial determination that salvage timber sale would have no effect on threatened or endangered species of spotted owl obviated need for formal consultation with FWS under ESA); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (finding agency "no effect" determination reasonable and rejecting argument that consultation was required).

Third, plaintiffs' new remedy would upend the status quo for the intervenor pesticide manufacturers, formulators, distributors, applicators, and all others affected by the 2004 Injunction. Under its termination provisions, the 2004 Injunction has ceased to apply to the many pesticides, uses, and localities for which EPA has made a "no effect" or "not likely to adversely affect" ("NLAA") determination. *See* 2004 Injunction pt. VI. By attacking the substantive validity of those determinations, plaintiffs are effectively asking the Court to alter status quo drastically. Granting plaintiffs' requested relief could reinstate the buffer zones and other constraints of the 2004 Injunction for the many pesticides that have been free from the injunction since EPA made the no-effect and NLAA determinations in the course of the past three years. Reviving the injunction would severely harm the interests of intervenors and all others affected by the 2004 Injunction.

Plaintiffs argue (at 1) the Court should entertain the instant motion despite the pendency of the appeal because, allegedly, the motion involves an order that neither EPA nor Defendant-Intervenors contested in the appeal. That is incorrect. CLA's brief to the Ninth Circuit maintained that the 2004 Injunction should be vacated because, when this Court granted plaintiffs partial summary judgment in the 2002 Order, it erred by conducting review without an administrative record, without identifying the relevant agency actions, and without applying the record facts to each pesticide; and by failing to review any alleged delay in EPA action under the proper legal standard. See Brief of Appellants CropLife America, et al. (June 1, 2004) at 14-23, 30 n.10, in *Washington Toxics Coalition v. EPA*, No. 04-35138 (9th Cir.). Thus, contrary to plaintiffs' view (Mot. at 1), the Ninth Circuit's decision may well affect the validity of the July

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2002 Order. The Court should not enlarge that Order in the interim until those fundamental issues of justiciability and procedure are resolved.

CONCLUSION

The Court has already granted procedural relief and further interim injunctive relief as it deemed appropriate, and should not give plaintiffs further bites at the apple. The Court should either deny plaintiffs' motion on the merits or strike it pending the Ninth Circuit's decision in the appeals.

Respectfully submitted this 14th day of March, 2005.

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